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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETER FRANKL and JOHN DECKARD,

Plaintiffs,

v.

NETOPIA, INC. and ALAN LEFKOF,

Defendants.

Case No. C07-80195 MISC MHP (EMC)

**REPLY MEMORANDUM IN SUPPORT
OF THE MOTION OF NETOPIA, INC.
TO QUASH OR MODIFY SUBPOENAS
TO NON-PARTY JOHNATHAN
GUTHART**

Date: October 3, 2007
Time: 1:00 pm
Cttrm: C, 15th Floor
Judge: Magistrate Judge Edward Chen

REPLY MEMORANDUM**I. Introduction**

The subpoenas of Plaintiffs Peter Frankl and John Deckard, directed toward non-party witness Jonathan Guthart, seek information that is irrelevant and, in some instances, protected from disclosure by the attorney-client privilege, the work product doctrine, and other privileges applicable under the federal laws or rules of procedure. Because the discovery Plaintiffs seek is improper, the Court should quash or modify the subpoenas.

In response, Plaintiffs rely on the same waiver of privilege arguments they rely on in opposition to Netopia's motion to quash their subpoenas to Morrison & Foerster. This response is not a complete answer. Plaintiffs never answer Netopia's arguments that (1) the subpoenas seek information that is not relevant in this case and (2) the subpoenas are overbroad and unduly burdensome.

Further, as stated in detail in Netopia's opening brief, many of the documents sought in the subpoenas are protected by the attorney-client privilege and or the work product doctrine. Despite Plaintiffs' protestations to the contrary, Netopia has not placed in issue any advice its Audit Committee received from Morrison & Foerster. Accordingly, to the extent that Guthart assisted Morrison & Foerster in advising the Audit Committee, the privilege protecting those communications has not been waived. Further, any disclosure to the SEC is immaterial, because Plaintiffs cannot show that any information within the scope of that disclosure is relevant to their claims.

Consequently, the Court should grant Netopia's motion to quash or modify the subpoenas.

II. Argument

A. The Subpoenas Are Overbroad And Seek Information Not Reasonably Calculated To Lead To The Discovery Of Evidence Relevant To Plaintiff's Claims.

As Netopia explained in its opening brief, Plaintiffs subpoenas to Guthart should be quashed because they seek abusive and unnecessary discovery. The discovery Plaintiffs seek from Guthart is entirely unrelated to the issues in this case. While this case involves alleged wrongful termination in violation of the whistleblower provisions of Sarbanes-Oxley, defamation and breach of contract, Plaintiffs seek discovery into the SEC's investigation of securities fraud allegedly committed by Netopia. Not only is this discovery only tangentially related to Plaintiffs' claims, but it is unnecessarily

1 cumulative in light of the fact that Plaintiffs' have already taken voluminous discovery in this case and
2 the core factual issues underlying their claims are undisputed. Notably, Plaintiffs do not challenge this
3 point in their opposition to this Motion.

4 The Court has authority to quash or modify a subpoena that seeks discovery of irrelevant
5 evidence. *See Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005) (explaining that courts
6 consider relevance as a factor when considering whether to quash a subpoena). Further, the Court has
7 authority to quash or modify a subpoena that is overbroad, or subjects the target to undue burden. *See*
8 *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 814 (9th Cir. 2003); *Gonzales v. Google, Inc.*,
9 234 F.R.D. 674, 680 (N.D. Cal. 2006).

10 As explained in Netopia's opening brief, the fact that the subpoenas seek "any and all"
11 documents referenced in Guthart's testimony before the SEC demonstrates both that the subpoenas are
12 overbroad and that they seek production of irrelevant evidence. The subpoenas contain no limitation
13 the scope of the information Plaintiffs seek from Guthart's SEC testimony. As Netopia explained in its
14 opening brief (at 4), Guthart testified on a variety of topics relating to his role as Netopia's outside
15 auditor. Much of this information is irrelevant to the issues in this case. This fact further shows that
16 the subpoenas are overbroad.

17 B. The Subpoenas Call For Some Documents Protected By The Attorney-Client Privilege
18 Or The Work Product Doctrine.

19 Further, as Netopia demonstrated in its opening brief, the subpoenas call for some documents
20 and information protected from disclosure by the attorney-client privilege or the work product
21 doctrine. In response, Plaintiffs claim the privilege has been waived because Netopia placed Morrison
22 & Foerster's work on behalf of the Audit Committee in issue and because Netopia disclosed privileged
23 information to outside parties.

24 First, Netopia has not placed privileged communications with Morrison & Foerster in issue. As
25 explained fully in Netopia's Reply in support of its Motion to Quash or Modify the Subpoena directed
26 to Morrison & Foerster, Netopia's affirmative defenses to Plaintiff's claims do not rely on the advice of
27 counsel, but were based on Plaintiffs' *conduct*. Furthermore, Plaintiffs are not entitled to discovery of
28 privileged materials simply because privileged information may indirectly be related to Netopia's

1 defenses. *See, e.g., In re Geothermal Resources Intern., Inc.*, 93 F.3d 648, 653 (9th Cir. 1996)
 2 (privileged information not discoverable when “only one form of indirect evidence regarding
 3 appellants’ good faith”).

4 Further, the fact that Morrison & Foerster shared confidential communications with KPMG
 5 does not defeat the privilege. Netopia explained in its opening brief (at 5-6) that the attorney-client
 6 privilege extends to communications made in the course of an internal investigation, and that an
 7 accountant’s work at the direction of an attorney for the purpose of rendering legal advice is protected
 8 by the attorney-client privilege. Plaintiffs do not challenge this contention.

9 Moreover, even assuming the merits of Plaintiffs’ argument that Netopia waived the privilege
 10 by disclosing documents to the SEC, the scope of such a waiver would extend only to the disclosure of
 11 relevant documents. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). As Netopia
 12 has explained, the discovery sought in these subpoenas has no bearing on Plaintiffs’ claims.

13 In sum, the subpoenas must be quashed or modified to avoid disclosure of documents or
 14 information protected by the attorney-client privilege or the work product doctrine.

15 C. Conclusion

16 For the foregoing reasons, Netopia respectfully requests the Court quash or modify the
 17 subpoenas served on non-party Jonathan Guthart.

18 Dated: September 19, 2007

AKIN GUMP STRAUSS HAUER & FELD LLP
 ROLAND M. JUAREZ
 STEPHANIE K. OSTEN

21 By /Roland M. Juarez /s/

Roland M. Juarez
 Attorneys for NETOPIA, INC. and ALAN
 LEFKOF

1 ROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a
 4 party to the within action; my business address is: 2029 Century Park East, Ste 2400, Los Angeles, CA
 90067. On September 19, 2007, I served the foregoing document(s) described as: **REPLY**
 5 **MEMORANDUM IN SUPPORT OF THE MOTION OF NETOPIA, INC. TO QUASH OR**
 6 **MODIFY SUBPOENAS TO NON-PARTY JOHNATHAN GUTHART** on the interested party(ies)
 below, using the following means:

7 Wade L. McClure
 8 Gibson, McClure, Wallace & Daniels, LLP
 8080 N. Central Expressway, Suite 1300, LB 50
 9 Dallas, Texas 75206

10 ☐ BY PERSONAL SERVICE I delivered such envelope(s) by hand to the offices of the addressee(s).

11 ☐ BY UNITED STATES MAIL I enclosed the documents in a sealed envelope or package addressed to the
 12 respective address(es) of the party(ies) stated above and placed the envelope(s) for collection and
 13 mailing, following our ordinary business practices. I am readily familiar with the firm's practice of
 14 collection and processing correspondence for mailing. On the same day that correspondence is placed
 for collection and mailing, it is deposited in the ordinary course of business with the United States
 Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

15 ☐ BY OVERNIGHT DELIVERY I enclosed the document(s) in an envelope or package provided by an
 16 overnight delivery carrier and addressed to the respective address(es) of the party(ies) stated above. I
 placed the envelope or package for collection and overnight delivery at an office or a regularly utilized
 drop box of the overnight delivery carrier.

17 ☐ BY MESSENGER SERVICE I served the documents by placing them in an envelope or package addressed
 18 to the respective address(es) of the party(ies) stated above and providing them to a professional
 messenger service for service.

19 ☐ BY FAX Based on an agreement of the parties to accept service by fax transmission, I faxed the
 20 documents to the respective fax number(s) of the party(ies) as stated above. No error was reported by
 the fax machine that I used. A copy of the record of the fax transmission(s), which I printed out, is
 attached.

21 ☒ BY ELECTRONIC MAIL OR ELECTRONIC TRANSMISSION. Based on a court order or an agreement of the parties
 22 to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the
 23 respective e-mail address(es) of the party(ies) as stated above. I did not receive, within a reasonable
 time after the transmission, any electronic message or other indication that the transmission was
 unsuccessful.

24 I declare that I am employed in the office of a member of the bar of this court at whose
 25 direction the service was made.

26 Executed on September 19, 2007 at Los Angeles, California.

27 Tracy Howe

28 [Print Name of Person Executing Proof]

/ Tracy Howe /s/

[Signature]